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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TOREN ERIC NIEBER et al., Defendants and Appellants.	D073059 (Super. Ct. No. SCD 267738)

APPEAL from judgments of the Superior Court of San Diego County, Laura W. Halgren, Judge. Affirmed.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Toren Eric Nieber.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant Lawrence Ray Johnson, Jr.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Christine Y. Friedman, Deputy Attorneys General, for Plaintiff and Respondent.

Toren Eric Nieber and Lawrence Ray Johnson, Jr., along with several accomplices, participated in a home invasion and robbery during which one of the victims was shot and killed. They were tried together and a jury convicted each of one count of felony murder (Pen. Code, §§ 187, subd. (a), 189, count 1),[1] two counts of first degree residential robbery in concert (§§ 211, 212.5, subd. (a), 213, subd. (a)(1)(A), counts 2 & 3), and one count of first degree burglary of an inhabited dwelling house with another person present (§§ 459, 460, subd. (a), 667.5, subd. (c)(21), count 4).[2] The jury also convicted each of them of a separate count of evading an officer with reckless driving relating to their arrests (Veh. Code, § 2800.2, subd. (a), counts 5 & 6). Johnson admitted allegations that he had two prison priors (§§ 667.5, subd. (b), § 668) and, in a separate hearing, the court found true allegations that Nieber had four prison priors, including a serious felony prior and a strike prior. The court sentenced Nieber to a determinate term of 31 years four months plus an indeterminate term of 50 years to life, and sentenced Johnson to a determinate term of 13 years eight months plus an indeterminate term of 25 years to life.

Nieber and Johnson both appeal and assert the trial court erred by requiring a prosecution witness, R.S., to take the stand despite knowing that she would refuse to testify, by instructing the jurors that they could consider R.S.'s refusal to testify during

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1 All further statutory references are to the Penal Code unless otherwise specified.

2 A third assailant, Elliott Scott Grizzle, was tried separately and convicted of felony murder, first degree robbery, and burglary. (See *People v. Grizzle* (Feb. 27, 2019, D072975) [nonpub. opn.] (*Grizzle*).)

their deliberations, and in its instructions to the jury regarding felony murder based on a conspiracy to commit the underlying felony. In addition, Nieber argues the trial court erred by permitting a police officer to identify Nieber as the individual in a surveillance video on the day of the murder and by precluding defense counsel from asking another prosecution witness, B.W., about the immunity he received in exchange for his testimony in a related case. He also asserts the cumulative effect of the trial court's various errors was prejudicial and contends any failure by his attorney to object to the improper jury instructions amounted to ineffective assistance of counsel. Finally, Johnson asserts the trial court erred by failing to instruct the jurors that they needed to make certain findings before considering statements made by one or more of the coconspirators during the robbery, and both Nieber and Johnson join in all issues raised by the other that may accrue to their benefit as well.

For the reasons set forth herein, we conclude the trial court should have permitted defense counsel to question B.W. about the immunity he received and should not have required R.S. to take the stand knowing she would refuse to testify. However, we conclude these errors were harmless and none of the remaining claims raised by either appellant in their initial opening briefs have merit.

Further, while the present appeal was pending, appellants filed two sets of supplemental briefs. In the first, they assert that Senate Bill No. 1437, which changes the elements of felony murder, renders the instruction on felony murder erroneous and therefore requires this court to reverse the judgments with respect to count 1. In response, the People contend this court can take no action under Sen. Bill No. 1437

because Nieber and Johnson must follow the procedure set forth in section 1170.95 (a provision added by Sen. Bill No. 1437) and petition the superior court for relief. We agree. We evaluate the jury instructions in the context of the law as it stood when they were given, find no error in those instructions in that context, and conclude that Nieber and Johnson must seek any relief they believe they are entitled to under Sen. Bill No. 1437 via a petition to the superior court in the first instance.

Second, in reliance on the recent opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Nieber and Johnson assert the trial court violated their state and federal due process rights by imposing certain fines and assessments pursuant to Government Code section 70373 and sections 1465.8 and 1202.4, subdivision (b), without first making findings as to their ability to pay them. The People argue Nieber and Johnson forfeited these arguments by failing to raise them in the trial court, and that they have the ability to pay from prison wages in any event. We agree and decline to remand the matter for resentencing based on the imposition of these fines and assessments.

Accordingly, we affirm the judgment. However, nothing in this opinion limits Nieber or Johnson's right to seek relief in the superior court in accordance with Sen. Bill No. 1437.

FACTUAL AND PROCEDURAL BACKGROUND

At approximately 11:45 a.m. on May 11, 2016, S.P. went to the grocery store and then returned to the house on Tommy Drive (the Tommy Drive residence) where he had

been staying with his brother, J.P, and three other individuals, B.A., B.W., and W.S. No one else was home at the Tommy Drive Residence at the time.

S.P. shut the front door, set his groceries down on the counter, and went to the back room of the house to check his cell phone. As he was doing so, several men suddenly came into the house through the front door. S.P. believed there were three to five men in the group. One of them held a gun to S.P.'s head and told him to get down on the ground. The gun was a Beretta-style automatic pistol, similar to a Colt .45, and the man that held it to his head was about six feet tall, clean shaven with tan skin and age lines on his face. S.P. did not get a good look at any of the other intruders.

As S.P. lay on the ground on his stomach with his hands behind his back, he heard the men rummaging through the house. The men asked him where B.A. was and what time he usually came home for the day, and then asked, "Where's the money? Where's the weed?" S.P. told them that he had no idea and that he was just staying there for a while. He was aware that there were some marijuana plants growing in the back yard and believed they belonged to B.A., but he did not know for sure and did not tell the intruders about them.

After a while, two of the men tied S.P.'s hands behind his back with an electrical cord and blue painter's tape and moved him to the front room of the house. They then covered his eyes with a piece of cloth, obstructing his sight. The men continued ransacking the house. They asked S.P. about some beer that was in the fridge and he thought he heard at least one bottle being opened and set down. He also heard them smoking something and believed it was methamphetamine because he did not smell

cigarette smoke or marijuana. S.P. thought he heard the names "Larry" and "Joe" but could not recall the context in which the names were spoken.

Approximately 15 to 20 minutes after the intruders moved S.P. to the front room, B.W. arrived at the residence. As soon as B.W. entered the house, one of the intruders put a silver handgun in his face and told him to get down. He got down on the ground and someone hit him in the back of the head with the gun. The intruders bound his hands behind his back and put a blindfold over his eyes so he could not see.

S.P. heard the intruders ask B.W. what his name was and then many of the same questions they had asked S.P. about B.A. and the location of the marijuana and money. They also asked B.W. if he was B.A.'s partner, and then went through his pockets and took his cell phone, his driver's license, a credit card, and a bank debit card. One of the men asked B.W. for the PIN number to the debit card. He told them the PIN and then heard one of the intruders leave and heard a car start outside.

Later, B.W. heard one of the intruders say, "Larry said the PIN didn't work," and believed the speaker was relaying this information from a person calling on the phone to another one of the intruders in the house. The intruders told B.W. the PIN he had given them did not work and threatened to chop off his fingers if he did not tell them the correct PIN. He then heard someone come back through the front door, and shortly thereafter, someone put a gun to the back of B.W.'s head and said, "What's the password? You gave me the wrong one." B.W. said that he had given them the correct PIN and perhaps they were trying to take out too much money. He later learned that they were using a credit

card instead of his bank card at the ATM, which is why the PIN he gave them did not work.

Somewhere between five and 20 minutes after the second discussion about the PIN number started, and about 30 to 40 minutes after B.W. had arrived at the Tommy Drive residence, B.A. returned to the residence and entered through the front door. S.P. heard a scuffle and then heard the intruders say, "Oh, hey, [B.]. We've been waiting for ya. Tell us where the stuff's at. Tell us where the weed's at. Tell us where the money's at." There were at least two voices talking to B.A. B.A. told them that everything he had was in a box and out in the backyard. They asked him if there was anything in his car and then S.P. heard movement towards the front door followed by a second scuffle.

About 20 seconds later, S.P. and B.W. heard four to six gunshots, footsteps running out of the house, and then silence. S.P. waited for about 30 seconds and then called out to B.W. to see if he was okay. S.P. managed to remove the restraints around his wrists and went to help free B.W. He did not see B.A. anywhere in the house so he went outside and found him lying facedown in the dirt next to the driveway in a pool of blood. S.P. attempted to assist B.A. while B.W. tried to find a neighbor to call the police.

Meanwhile, a neighbor had heard the gunshots and walked outside to investigate. He heard someone say, "Help me," and saw S.P. rolling B.A. onto his back in the driveway. He could see that B.A. was seriously injured and called 911. The call was received at 2:48 p.m. and the police arrived a few minutes later at 2:51 p.m.

B.A. was pronounced dead at the scene.

Investigation and Forensic Evidence

The police interviewed B.W. and S.P. on the scene that same day. B.W. said that he heard the name "Larry," but also said S.P. had told him that he heard the name "Larry."

Several crime scene specialists collected evidence from the Tommy Drive residence that evening. Photographs were taken of the blue tape around B.W.'s wrist and the injury to the back of his head from where he was hit with the gun. The house appeared to have been ransacked, drawers had been opened and emptied, and items were left in disarray all over the floor. Officers collected a lighter and a pipe used to smoke methamphetamine from a couch in the front room, a half empty beer bottle from the floor, and another open beer bottle from the kitchen counter. They also collected and inventoried a pillowcase full of items that was left in the hallway. Inside the pillowcase, they found a plastic baggy of marijuana, cellphones, and ID's and credit cards belonging to B.W. and B.A.

The police conducted DNA testing on a number of items retrieved from the house and found DNA belonging to Nieber on the mouth of the beer bottle retrieved from the living room floor, DNA belonging to Johnson on a roll of blue painter's tape, and DNA belonging to Nieber, Johnson, and Grizzle—another separately convicted accomplice—on the mouth area of the methamphetamine pipe.[3]

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3 DNA belonging to Grizzle was also found on several other items, including the other beer bottle, a black glove, and a mask.

Officers on the scene found four shell casings behind the front door and in the living room of the Tommy Street residence, and three bullets were retrieved from in and around B.A.'s body. A criminologist later determined the three bullets were all fired from the same gun and the four shell casings were all fired from the same gun but, because the casings and bullets interact with different parts of the gun, she could not determine whether the bullets and casings were from a single gun.

The police also obtained records for B.W.'s stolen credit cards, which indicated on the day of the murder someone had tried to use his Bank of America and Discover cards at a U.S. Bank near the Tommy Drive residence at around 2:00 p.m., and that another attempt was made to withdraw cash using the Bank of America card at a nearby 7-Eleven at 2:27 p.m. Surveillance footage from the U.S. Bank showed a man driving B.W.'s vehicle through the drive-thru ATM at approximately 2:00 p.m. and, at trial, two different detectives identified the driver as Nieber. Video footage from 7-Eleven showed a white male using the ATM around 2:27 p.m., but the man's face was not visible.

An autopsy revealed that B.A. had sustained three gunshot wounds, including one that pierced his lung and aorta. Based on the autopsy report, the medical examiner opined the cause of death was gunshot wounds to the thorax and the manner of death was homicide.

Arrests

The police arrested Johnson in San Diego on May 16, 2016, following a high-speed car chase during which Johnson exceeded the speed limit and ran at least one red light. Johnson was driving a silver Chevrolet Monte Carlo that had been listed on a

registration form filled out by Grizzle at a hotel in La Mesa on May 10. The police searched the car and found documents belonging to R.S. in the front passenger seat. Nieber was arrested three days later, on May 19, after a separate car chase in which Nieber ran a red light and crashed into another vehicle.

Grizzle was arrested in Nevada several weeks later, on June 16, 2016. He had a key to a car that had been rented in San Diego, R.S. was with him, and when officers approached him, he asked if they were from San Diego. He also had a cell phone in his possession, and the police obtained records indicating the cell phone had been in the vicinity of the Tommy Drive residence between at least 1:07 and 2:35 p.m. on May 11.

Defense Case

S.P. told the officer on the scene that he was confident he could identify the individual that held a gun to his head but testified at trial that he did not recognize either Nieber or Johnson.[4] Further, because he was blindfolded for much of the time, he did not know who was in the house at any given time and could not be sure whether or when one or more of the intruders left, and also could not be sure of the time. S.P. denied having any knowledge of B.A. or B.W. being involved in the sale of drugs, but also stated that it was important to him to protect the memory of B.A. and that he would not like B.A.'s name to be tarnished.

B.W. testified that he had witnessed B.A. sell small bags of marijuana to people visiting the house, that it sometimes made him uncomfortable, and that there was at least

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4 S.P. also testified that he did not recognize Grizzle at that trial.

one "hard guy" that had come to the house that he did not like. He admitted owning an AR-15 shotgun but denied ever growing marijuana or having valuable amounts of marijuana in his possession and further denied being a partner of B.A. with respect to any marijuana growing or sales B.A. was involved in. However, a former girlfriend of B.W. testified that B.W. had grown and sold drugs while living at a prior residence and also at the Tommy Drive residence, and that he had become violent with her on several occasions during their relationship. She did not believe B.W. was a truthful person. A police officer also testified that there had been an investigation into the occupants of the Tommy Drive residence regarding possible drug sales.

A neighbor testified that she saw a man matching Johnson's description—approximately six foot four inches, thin, with brown hair and wearing dark clothing—leaving the Tommy Drive residence in a green SUV at approximately 2:15 p.m. There were other people in the vehicle and there was no testimony indicating the green SUV, or the persons therein returned to the residence. Johnson's defense counsel argued the neighbor's description matched the video surveillance from 7-Eleven, indicating it was Johnson that was trying to use B.W.'s card at 7-Eleven around 2:30 p.m., and that there was no evidence that he returned to the Tommy Drive residence thereafter.

Finally, the neighbor that called the police testified that he went outside shortly after hearing the gunshots and did not see anyone leave. He did see S.P. walk over to and stop in front of a white SUV for a couple of seconds, but he could not see what he was doing. S.P. admitted taking keys to the SUV out of B.A.'s hand after he was shot but denied unlocking or opening the vehicle.

DISCUSSION

I.

Identification of Nieber by Detective Norris

Nieber contends the trial court violated his federal and state right to due process by allowing San Diego Police Department Detective Tim Norris to identify him in a still frame photograph taken from video surveillance footage. He asserts oral testimony is inadmissible to prove the content of a video, the testimony was tantamount to offering an opinion of guilt, and it was outside the witness's expertise. The People contend Nieber forfeited this argument by failing to object on these specific grounds, and that it was not error to allow the testimony in any event.

A. *Additional Background*

Detective Norris was a member of the homicide team at the time of the murder and testified at trial regarding the investigation. Detective Norris identified Nieber in the courtroom and stated that he had encountered Nieber in the hospital on May 19, 2016, after Nieber's arrest, that he swabbed Nieber's mouth for DNA, and that he had observed the crime scene specialist photograph Nieber. He identified Nieber in a photograph taken by the crime scene specialist and noted a small tattoo on Nieber's neck just below his right ear.

Detective Norris then testified that he had previously reviewed video footage from U.S. Bank surveillance cameras. The prosecutor showed him a still frame from the video and asked him to identify the individual depicted. Defense counsel objected and stated "the item speaks for itself" but the trial court overruled the objection and Detective Norris

testified that the individual in the photograph was Nieber. Detective Norris also noted that Nieber had some facial hair below his lower lip in the video and stated Nieber did not have the same facial hair when he saw him in the hospital after his arrest.

B. *Forfeiture*

Evidence Code section 353 precludes a party from complaining on appeal that evidence was inadmissible on a certain ground unless he or she made a timely and specific objection on that ground below. (Evid. Code, § 353, subd. (a).) Here, the People contend that Nieber's counsel's objection and statement, "the item speaks for itself," was not specific enough to preserve the arguments he raises on appeal. We disagree.

Although Nieber's counsel did not specifically list the three arguments he now makes on appeal, his objection and brief statement, when read in context of the question that was asked, was sufficient to alert the court and the parties of Nieber's contention that Detective Norris's identification of Nieber in the photograph was improper and inadmissible, and Nieber may expand on his arguments supporting the objection on appeal. (See *People v. Partida* (2005) 37 Cal.4th 428, 432-436 [objection must fairly alert the court and other party to "the nature of the anticipated evidence and the basis on which exclusion is sought;" appellant may make a legal due process argument on appeal based on admission of evidence over counsel's objection].) We therefore address Nieber's contentions regarding Detective Norris's identification but conclude, in any event, that they lack merit.

C. *Merits*

Lay opinion testimony from an officer identifying an individual depicted in a surveillance image is generally admissible so long as: 1) the witness testifies from personal knowledge of the defendant's appearance at or before the time the image was taken; and 2) the testimony aids the trier of fact in determining a crucial identity issue. (*People v. Mixon* (1982) 129 Cal.App.3d 118, 128 (*Mixon*).) Accordingly, at least one court has held that identification testimony by police officers was admissible where the officers based their opinions on their prior contacts with the defendants and the defendants had changed their appearance by removing facial hair. (*Id*. at pp. 127-128.) In addition, while there must be some evidence indicating the officer was familiar with the defendant, it is not necessary for the officer to have had contact with the defendant before the crimes occurred. (*People v. Leon* (2015) 61 Cal.4th 569, 600 (*Leon*).) We review a trial court's decision to permit such testimony for an abuse of discretion. (*Ibid*.)

Here, Detective Norris testified that he saw Nieber on the day of his arrest, approximately eight days after the surveillance video at issue was recorded. He was present when Nieber was photographed and could identify distinguishing features, such as the tattoo on Nieber's neck. Moreover, although Detective Norris identified Nieber based on the still frame photo, he testified that he had watched the video and thus it is reasonable to infer that he also saw Nieber's demeanor and could testify the individual in the single still frame was the same person he observed on the video. As Detective Norris had personal knowledge of Nieber's appearance and his testimony aided the jury in determining a crucial identity in the case, his identification of Nieber in the still frame

from the surveillance video was admissible. (See *Mixon*, *supra*, 129 Cal.App.3d at p. 128; *Leon*, *supra*, 61 Cal.4th at p. 600.)

Nieber asserts the video qualifies as a writing under Evidence Code section 1523, and that Detective Norris's oral testimony was therefore inadmissible to prove the content of the video. (See *People v. Panah* (2005) 35 Cal.4th 395, 475 [video is a writing for the purposes of the best evidence rule].) However, as stated in the case Nieber relies upon, "[t]he purpose of the best evidence rule is 'to minimize the possibilities of misinterpretation of writings by requiring the production of the original writings themselves, if available.' " (*Ibid*.) The video at issue here was admitted into evidence, and Detective Norris's testimony was not used to prove the content of the video, but rather to assist the jury in identifying the individual seen therein based on, amongst other factors, the tattoo on his neck. As discussed, *ante*, in such cases, courts have long upheld the admission of testimony by police officers identifying defendants in surveillance footage, despite the best evidence rule set forth in Evidence Code section 1523. (*Leon*, *supra*, 61 Cal.4th at p. 601.)

Next, Nieber contends Detective Norris essentially offered an improper opinion as to Nieber's guilt, and that this opinion was outside Norris's area of expertise. While we agree that it would have been improper for Detective Norris to offer an opinion as to the ultimate fact in the case, the defendants' guilt, he did not do so here. (See *People v. Mason* (1960) 183 Cal.App.2d 168, 173 (*Mason*) [improper to elicit opinion testimony on the ultimate fact which the court or jury is called upon to decide]; *People v. Torres* (1995) 33 Cal.App.4th 37, 48 (*Torres*) [officer's testimony that robbery "is what

happened in this particular case" was improper].) Detective Norris simply identified Nieber as the individual shown in a surveillance video taken at a bank. The prosecution asserted the video was evidence of Nieber's guilt as it showed Nieber using a card that had been stolen from B.W. during the robbery, but that assertion relied on several other pieces of evidence, including the bank records and the video itself, all of which the jurors would need to evaluate before reaching an ultimate conclusion as to guilt. As Detective Norris's testimony alone was not enough to convict Nieber, it did not equate to an opinion as to the ultimate issue of Nieber's guilt or innocence. (Cf. *Mason*, *supra*, at p. 173; *Torres*, *supra*, at p. 48.) Moreover, as discussed, it was a lay opinion based on Detective Norris's personal familiarity with the defendant, and therefore was not beyond his area of expertise.

Finally, even if the trial court had erred by allowing Detective Norris to identify Nieber as the individual in the surveillance video, we would also conclude that any such error was harmless under any standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*) [constitutional error is harmless if it is proven beyond a reasonable doubt that the error did not contribute to jury verdict]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [error is harmless unless appellant shows there is a reasonable probability of a more favorable result absent the error].) First and foremost, Detective Josse testified that he was involved in the arrest of Nieber on May 16 and separately identified Nieber as the individual depicted in the same still-frame photograph from the surveillance tapes. Nieber's counsel did not object to that identification at trial or on appeal and, thus, the jury could have relied on it instead. Further, as discussed, the entire video and the still-

frame photograph at issue were entered into evidence and an identifying tattoo on Nieber's neck was visible in the video, such that the jurors could independently view the photos and video to make their own determination. Indeed, the prosecutor encouraged the jurors to do just that during closing arguments, relying on the tattoo on Nieber's neck, and not Detective Norris's testimony, to conclude the individual shown in the video was Nieber. Thus, we are confident the jurors would have reached the same conclusion even absent Detective Norris's identification of Nieber in the video.

II.

Exclusion of Cross-Examination Regarding Immunity Given to B.W.

Nieber contends the trial court erred by limiting the cross-examination of B.W. to preclude defense counsel from asking B.W. about a grant of immunity that he received during the separate trial of coconspirator Grizzle. We agree that the trial court should have allowed the inquiry, but ultimately conclude any error was harmless on this record.

A. *Additional Background*

The prosecution called B.W. to testify in Grizzle's trial, B.W. invoked his right to refuse to answer under the Fifth Amendment, and the court granted him use immunity and compelled him to answer. B.W. then testified at the trial against Nieber and Johnson voluntarily, without invoking the privilege afforded by the Fifth Amendment and without being granted any immunity.

Although the trial court had previously stated it would allow counsel to mention the fact that a witness had previously been granted immunity during opening statements, the court raised the issue again during a break in B.W.'s testimony and asked the parties

to address whether the previous grant of immunity was relevant. The People argued the previous grant would be relevant as to B.W.'s credibility only if he testified differently in the present trial and that, if instead, B.W.'s testimony remained consistent, questions regarding the previous grant of immunity would not have any probative value. In response, defense counsel argued the exact opposite was true: If B.W. testified consistently, the previous grant of immunity would still protect the testimony and therefore would be relevant. The court said that it would consider the issue over the lunch hour and invited additional comments from the parties.

After the recess, defense counsel maintained that the previous offer of immunity was relevant and added that B.W. likely reviewed his prior testimony before testifying in the present case. In response, the prosecutor argued that evidence regarding the prior grant of immunity should be excluded under Evidence Code section 352, even if there was some minimal probative value, because it would cause the jury to speculate as to why B.W. no longer required immunity. The court agreed and stated that it did not see the relevance of the use immunity, but that even if it was relevant, it would likely cause too much confusion and speculation on behalf of the jurors. The court therefore excluded any cross-examination of B.W. based on the prior grant of immunity.

B. *Relevant Legal Principles and Standard of Review*

The Sixth Amendment affords all defendants the right to confront and cross-examine witnesses against them. (See *People v. Pearson* (2013) 56 Cal.4th 393, 454 (*Pearson*).) The defense is typically given wide latitude to test the credibility of such witnesses, but the trial court may still place reasonable limits on defense counsel's

inquiries. (*Id*. at p. 455.) For example, the trial court may exclude evidence of marginal impeachment value pursuant to Evidence Code section 352. (*Ibid*.) We review the trial court's evidentiary rulings for an abuse of discretion, and the court's exercise of discretion in limiting the scope of cross-examination does not violate the defendant's Sixth Amendment right to confrontation unless " ' "the prohibited cross-examination would have produced 'a significantly different impression of [the witness's] credibility.' " ' " (*Id*. at p. 455-456.)

Of particular relevance here, the California Supreme Court has stated it is a well-established principle that defense counsel is entitled to cross-examine a prosecution witness regarding an expectation of leniency or immunity, as such evidence "is obviously probative of bias or motive." (*People v. Dyer* (1988) 45 Cal.3d 26, 49 (*Dyer*).) However, in *Dyer*, the court went on to conclude the trial court did not err when it allowed the defense to elicit testimony that a witness had worked for the police but precluded questions regarding the prosecutor dropping charges against the witness in an unrelated case because there was no evidence that the witness was biased or motivated by any agreement or promise of leniency with respect to anything that occurred in the unrelated case. (*Id*. at pp. 45-46, 49-50.)

C. *Analysis*

Here, B.W. was granted use immunity in exchange for his testimony in another trial. Unlike the situation in *Dyer*, though, the other case was not unrelated. The accusations against Grizzle arose from the same incident—the robbery and murder of B.A.—and B.W.'s testimony was consistent in both cases. Further, the grant of immunity

B.W. received in Grizzle's case specified that B.W. could still be subject to prosecution based on the testimony he gave if he committed perjury. Accordingly, it would be reasonable for the jury to infer that B.W. would be motivated to testify consistently in the case against Nieber and Johnson based on concerns that he would be impeached by his prior testimony and that the prior grant of immunity could be nullified if his testimony was inconsistent. The defense should have had the opportunity to cross-examine him in that regard.

The People contend the trial court properly limited the scope of cross-examination because a grant of use immunity, like the one B.W. received here, is less probative than a grant of transactional immunity[5] and the potential for speculation or confusion by the jurors therefore outweighed the marginal relevance of the use immunity. To the contrary, because a witness testifying under a grant of use immunity can still be prosecuted, the witness may actually have a greater motivation to lie than a witness that had received full protection under a grant of transactional immunity. (See *People v. Hampton* (1999) 73 Cal.App.4th 710, 722-723.)

Further, while the People assert the jury may have been confused or encouraged to speculate regarding the grant of immunity, they do not offer any explanation as to how such confusion or speculation would actually be prejudicial. If anything, the jury was likely to consider the fact that B.W. received immunity in only one of the two trials as a

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5 Use immunity protects a witness only against the actual use of his compelled testimony, and evidence derived therefrom, while transactional immunity protects the witness more broadly against prosecution related to matters about which the witness testified. (*People v. Kennedy* (2005) 36 Cal.4th 595, 613.)

factor in determining the impact of that immunity on B.W.'s credibility, which they were entitled to do. To the extent the court had other concerns about speculation or confusion, it could have minimized them by instructing the jurors that they were to consider the evidence regarding the prior immunity only in deciding B.W.'s credibility and, in particular, whether the immunity influenced his testimony. (See, e.g., *People v Homick* (2012) 55 Cal.4th 816, 866 [limiting instruction that evidence could be used only on the issue of credibility cured potential prejudice].) We therefore conclude that defense counsel was entitled to cross-examine B.W. regarding any potential bias or motives related to the immunity, and the trial court erred by precluding such questions. (See *Dyer*, *supra*, 45 Cal.3d at p. 49.)

This does not end our inquiry, though. As discussed above, California law states that the trial court's limitation on the scope of cross-examination violates the defendants' Sixth Amendment right to confrontation only if " ' "the prohibited cross-examination would have produced 'a significantly different impression of [the witness's] credibility.' " ' " (*Pearson*, *supra*, 56 Cal.4th at p. 455-456.) Similarly, to the extent the defendants' federal constitutional rights are implicated, we are not required to reverse the judgment under the federal *Chapman* standard if the error was harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684*; Chapman*, *supra*, 386 U.S. at p. 24.) Thus, when the error at issue involves a denial of the defendant's right to impeach a prosecution witness for bias, "[t]he correct inquiry is whether, assuming that the damaging potential of the [erroneously precluded] cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a

reasonable doubt." (*Van Arsdall*, at p. 684.) Relevant factors that the court may consider in deciding whether the error was harmless under this standard include the overall strength of the witness's testimony; whether the testimony was cumulative and corroborated or contradicted by other evidence; the impact of any cross-examination that was permitted; and the overall strength of the prosecution's case. (*Ibid*.)

Although B.W. was present at the scene during the commission of the crimes, he also presented significant credibility issues, even absent evidence relating to the prior immunity. He continually denied ever being involved in drug sales, even on the stand at trial, but his previous girlfriend testified that he had been involved in the sale of marijuana and had hidden that involvement from her for some time, that he had engaged in domestic violence against her, and that she did not believe he was an honest person. Further, the prosecutor admitted that B.W. had not spoken candidly about his past and told the jurors that they could consider his ex-girlfriend's testimony as a factor when determining his credibility.

Not surprisingly, then, the prosecutor relied primarily on testimony from S.P., a more credible witness, during closing and discussed B.W.'s testimony primarily as corroboration for S.P.'s. And to the extent the prosecutor did rely on B.W.'s testimony, he pointed out that the testimony was further corroborated by physical evidence, such as the DNA evidence, the injury to the back of B.W.'s head, and the bank records and video surveillance of the perpetrators attempting to use B.W.'s credit cards. In addition, B.W.'s statement that he heard one of the intruders say the name "Larry" was corroborated by his statement to Detective Norris at the scene shortly after the crimes.

Finally, had the jurors learned of the immunity, they almost certainly would have inferred it was somehow related to B.W.'s involvement with the sale of drugs, but B.W.'s involvement in drugs was of minimal significance to the overall case. There was ample evidence that B.A. was selling marijuana, with or without B.W.'s help, and that his marijuana and money were the target of the robbery. And to the extent B.W.'s involvement in drugs was relevant to his credibility, the testimony from his former girlfriend and the admission by the prosecutor that B.W. had been less than honest about his past were far more significant than any testimony regarding the prior grant of immunity would have been.

We therefore conclude that, although the trial court should have permitted defense counsel to cross-examine B.W. regarding the immunity he was granted in the Grizzle trial, any error was harmless beyond a reasonable doubt and reversal is not necessary because inclusion of the omitted cross-examination would not have impacted the juror's determination of B.W.'s credibility in any significant way.

III.

R.S.'s Refusal to Testify

Nieber and Johnson both assert the trial court erred by forcing prosecution witness R.S. to take the stand knowing she would refuse to testify, by instructing the jurors that they could consider that refusal in their deliberations, and by failing to independently determine whether the refusal to testify was based on an assertion of privilege under the Fifth Amendment. We agree that the court should not have required R.S. to refuse to testify in the presence of the jury, but again find the error was not prejudicial.

A. *Additional Background*

The prosecution presented evidence that the police found papers belonging to R.S. in the front passenger seat of the Monte Carlo Johnson was driving prior to his arrest and that R.S. was staying at a hotel with Grizzle when they arrested him several weeks later.

Given this evidence, the People issued a subpoena for R.S. to testify and made the following proffer to the court regarding the testimony they expected to elicit: R.S. was with Grizzle, Johnson, and Nieber on May 11; R.S. drove the Monte Carlo to work but Grizzle came and picked it up at some point and then picked her up from work later; Grizzle changed his appearance around the same time by shaving his facial hair; and, R.S. subsequently went to Las Vegas with Grizzle.

The court noted that R.S. had been arrested along with Grizzle and appointed separate counsel for her to address any potential Fifth Amendment concerns. After speaking with R.S., the appointed counsel informed the court that R.S. was refusing to testify, but that the refusal was not based upon an assertion of her Fifth Amendment rights.

The prosecutor then requested that R.S. be brought on the stand in the presence of the jury to see if she would answer questions and asked the court to hold her in contempt in the event that she did in fact refuse to testify. Johnson's counsel objected based on Evidence Code section 352 and argued it would be prejudicial to have R.S. refuse to testify in open court because the jurors were likely to infer that she was scared of the defendants or retaliation by the defendants and that the evidentiary value of the proffered testimony was not substantial enough to outweigh the potential prejudice. Nieber's

counsel agreed and added that a court typically would not force a witness to plead the Fifth in front of a jury and that the same concerns would apply even if R.S. did not plead the Fifth.

The trial court ultimately decided the proper procedure would be to first establish that R.S. was not refusing to testify based on her rights under the Fifth Amendment outside the presence of the jury and then to allow R.S. to take the stand in the presence of the jury, to hold R.S. in contempt if she continued to refuse to testify, and, if that were the case, to provide the jury with an instruction indicating they could make a negative inference based on the refusal. R.S. refused to answer questions posed by the court outside the presence of the jury and the court confirmed through her counsel that she was not asserting her privilege under the Fifth Amendment. The court then explained that she could be held in contempt if she continued to refuse and called in the jury.

R.S. stated her name but then answered the prosecutor's questions by repeatedly stating, "I refuse to testify." The court then stated that R.S. had no legal right not to testify and held her in contempt of court, in front of the jury. Later, the court instructed the jury, "[R.S.] did not have the right to refuse to answer questions in this case. You may consider this refusal during your deliberations." (See CALCRIM NO. 320, alternative B.)

B. *Relevant Legal Principles*

In *People v. Mincey* (1992) 2 Cal.4th 408 (*Mincey*), the California Supreme Court established that it is improper for a trial court to require a witness to be put on the stand to claim the Fifth Amendment privilege in front of the jury, because exercising one's

privilege against self-incrimination is not relevant evidence but could allow the jury to make a speculative and unfounded negative inference. (See *id.* at pp. 440-442; see also, *People v. Hill* (1992) 3 Cal.4th 959, 993 ["a jury may not draw any inference from a witness's exercise of a constitutional right"].) However, in subsequent cases, California appellate courts have distinguished the court's holding in *Mincey* where the witness is not claiming a Fifth Amendment privilege and has no constitutional or statutory right to refuse to testify and have concluded, under the particular circumstances at issue in each case, that it was appropriate for the court to require the witness to take the stand to refuse to testify in the presence of the jurors and that the jurors were then entitled to draw a negative inference from the refusal. (*People v. Lopez* (1999) 71 Cal.App.4th 1550 (*Lopez*); *People v. Morgain* (2009) 177 Cal.App.4th 454 (*Morgain*).)

In *Lopez*, the charges against the defendant involved gang allegations and the prosecution sought to establish the requisite pattern of criminal gang activity by calling a known veteran gang member, Juan Miranda, to testify about a gang-related assault that he had committed. (*Lopez*, *supra*, 71 Cal.App.4th at p. 1553.) Prior to taking the stand and outside the presence of the jury, Miranda made clear that he would not testify against Lopez. (*Ibid*.) The court informed him that he had no right to withhold testimony and no privilege under the Fifth Amendment because he had already pled guilty to the assault, but he persisted in his refusal. (*Ibid*.) The court determined it had no ability to prevent the prosecutor from calling Miranda to the stand, the prosecutor did so, and, in the presence of the jury, Miranda refused to testify and the court held him in contempt. (*Ibid*.) On appeal, Lopez relied on *Mincey* to assert the court erred by forcing Miranda to

take the stand. (*Lopez*, at p. 1554.) The court concluded that the holding in *Mincey* was not applicable because Miranda had no constitutional or statutory right to refuse to testify and, therefore, the jurors were entitled to draw a negative inference from the refusal. (*Ibid*.)

In *Morgain*, the People obtained a subpoena for the testimony of the defendant Morgain's girlfriend, Marquita Wallace, based on a statement Wallace made to the police indicating that Morgain had confessed to her. (*Morgain, supra*, 177 Cal.App.4th at p. 459.) Wallace initially answered some questions but when the prosecutor started asking about the incident at issue, Wallace stated, "I ain't answering it." (*Id*. at p. 460.) She then answered a few more questions but denied talking to the police or telling them that Morgain told her that he was going to the victim's house on the day of the crime. (*Id*. at pp. 460-461.) Eventually the court ordered Wallace to answer the prosecutor's questions but she continued to refuse, and the court held her in contempt, outside the presence of the jury. (*Id*. at p. 462.) The court later struck Wallace's testimony and instructed the jury not to consider the prosecutor's questions as evidence but allowed the prosecutor to argue the jury could make a negative inference from the witness's refusal to testify. (*Ibid*.) Relying on *Lopez*, the appellate court in *Morgain* concluded the prosecutor was entitled to urge the jury to draw an adverse inference from the fact that Wallace had refused to testify, even though the court had struck the entirety of her actual testimony. (*Morgain*, at pp. 467-468.)

C. *Analysis*

The People contend the decisions in *Lopez* and *Morgain* establish that the trial court followed the appropriate procedure in this case. Appellants contend *Lopez* and *Morgain* are not applicable and maintain that the trial court erred by relying on R.S.'s counsel's representation that R.S.'s refusal to testify was not based on the Fifth Amendment, by requiring R.S. to take the stand and refuse to testify in front of the jury, and by instructing the jurors that they could consider the refusal in their deliberations.

1. *Determination That R.S. Was Not Invoking the Fifth Amendment*

The relevant cases suggest a difference in procedure as between a witness that refuses to testify based on a claim of privilege under the Fifth Amendment and one that does not claim such a privilege, so we turn first to appellants' assertion that the trial court did not adequately determine whether R.S.'s refusal was based on a claim of privilege under the Fifth Amendment.

Specifically, appellants contend the trial court had an obligation to make its own inquiry, outside the presence of the jury, to determine whether R.S.'s refusal to testify was based on a concern of self-incrimination. The cases they rely upon, however, addressed the trial court's obligation to determine whether a witness that has invoked his or her privilege not to testify pursuant to the Fifth Amendment has a right to do so or, in other words, whether there is a real possibility that the witness's testimony will actually be self-incriminating. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304-305; *People v. Pugh* (1983) 145 Cal.App.3d 854, 859; Evidence Code § 404.) These cases do not confer

any obligation on the trial court where a witness has not invoked the privilege and, here, R.S. explicitly did *not* rely on the privilege afforded her under the Fifth Amendment.[6]

Regardless, acknowledging that self-incrimination could be an issue under the circumstances, the trial court did make a reasonable effort to determine whether the refusal was based on a privilege. The trial court appointed separate counsel specifically for the purpose of advising R.S. with respect to her testimony. R.S.'s counsel made clear that he had informed R.S. of the relevant issues and R.S. was present on the stand when counsel represented that R.S.'s refusal to testify was not based on the Fifth Amendment. Further, the prosecutor had already made a proffer of R.S.'s expected testimony and nothing included therein was seemingly self-incriminating, which further supported counsel's representation that R.S. was not relying on the privilege. In this context, and particularly given R.S.'s general refusal to engage directly with the court, we find no error in the court's reliance on counsel's representation.

Finally, Johnson asserts the trial court erred by not making its own determination regarding the privilege because R.S. could not be compelled to assert the privilege in front of the jury, but nothing the trial court did required R.S. to do so. The relevant exchange occurred outside the presence of the jury and once R.S. took the stand, the court had already established she was not relying on the privilege. (See *Lopez, supra*, 71 Cal.App.4th at p. 1555 [initial inquiries testing the validity of a claimed privilege

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6 Appellants reliance on *People v. Sanchez* (2011) 53 Cal.4th 80 to assert the trial court had an obligation to hold a hearing also is misplaced as *Sanchez* concerns a claim of ineffective assistance of counsel and the trial court's failure to conduct a *Marsden* hearing, which is an entirely different protocol.

should be made outside the presence of the jury].) The trial court did state that R.S. had no legal right or privilege to refuse to testify in front of the jury—in the context of making its ruling on contempt. However, that finding was essential to the contempt ruling, it was not a claim of privilege and was based on the earlier representation of R.S.'s counsel outside the presence of the jury.

2. *R.S.'s Refusal to Testify and Associated Negative Inference*

Having concluded the trial court adequately determined R.S.'s refusal to answer was not predicated on the Fifth Amendment, we turn next to appellants' assertion the trial court erred by requiring R.S. to take the stand only to refuse to testify.

Appellants contend R.S.'s refusal to testify was not evidence of anything other than a refusal to testify and therefore was not relevant evidence as a matter of law. To the contrary, *Lopez* and *Morgain* both suggest that a witness's mere refusal to answer, when not based on a Fifth Amendment privilege, can be relevant evidence. Specifically, in *Lopez*, the court concluded the gang member Miranda's refusal to testify supported the gang expert's testimony that gang members tend to protect one another, and the jury was entitled to consider whether Miranda's defiance validated the gang expert's opinion. (*Lopez*, *supra*, 71 Cal.App.4th at pp. 1555-1556.) In *Morgain*, the court held that there was evidentiary value to the fact that the witness, Wallace, took the stand and refused to testify without justification, even though the court had struck the actual testimony, and that the prosecutor was entitled to argue the refusal suggested Wallace was trying to protect her boyfriend, the defendant. (*Morgain*, *supra*, 177 Cal.App.4th at p. 468.)

We agree with *Lopez* and *Morgain* that, at least in some circumstances, the fact that a witness refuses to testify might be relevant evidence, even if the refusal itself is stricken.[7] However, pursuant to Evidence Code Section 352, the trial court had an obligation to weigh the probative value of that evidence, namely the refusal, against the probability that it would mislead the jury or otherwise create undue prejudice. To the extent we conclude that R.S.'s testimony was relevant at all, appellants assert the potential to mislead the jury was significant and outweighed any probative value. On this point, we agree.

The prosecution had presented evidence indicating R.S. was staying at the hotel with Grizzle when he was arrested and documents belonging to R.S. were recovered from the Monte Carlo Johnson was driving at the time of his arrest. Given the apparent close connection between R.S. and the defendants, it would have been reasonable for the jury to infer from R.S.'s recalcitrant behavior on the stand that she had significant additional evidence related to the crime at issue, but that she either wanted to protect the defendants or feared them. Further, the court holding R.S. in contempt and remanding her to the custody of the bailiff only served to strengthen this inference.

In reality though, R.S. did not have any particularly significant testimony to offer. At most, her testimony would have established that Johnson, Nieber, and Grizzle were

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[7] Appellants point to *People v. Perez* (2016) 243 Cal.App.4th 863 as distinguishing *Morgain* but this case is not analogous to *Perez* as there, the trial court allowed extensive questioning of the witness as a hostile witness, despite the witness's refusal, and here, the trial court only allowed the prosecutor to ask a few basic questions before holding R.S. in contempt. (*Id*. at pp. 884-889.)

together earlier in the day on May 11, 2016, and that Grizzle changed his appearance. Neither of these facts were particularly probative when considering the totality of evidence, including DNA evidence that placed all three coconspirators at the Tommy Drive Residence and that Nieber, one of the actual defendants here, also changed his appearance. Thus, there was a significant risk that R.S.'s refusal to testify would mislead the jury by causing them to infer that R.S. had more significant knowledge about the crimes than she actually did.

Further, *Morgain* and *Lopez* are distinguishable on this point. Although the courts in those cases concluded the refusals were relevant evidence, neither court directly addressed the potential for prejudice outside of the context of distinguishing the cases from those in which the witness claimed a Fifth Amendment privilege. (*Lopez*, *supra*, 71 Cal.App.4th at pp. 1555-1556; *Morgain*, *supra*, 177 Cal.App.4th at p. 468.) Regardless, the potential testimony, and subsequent refusals, in both *Lopez* and *Morgain* had some arguable probative value. As discussed, the refusal in *Lopez* directly supported the gang expert's opinion and the girlfriend in *Morgain* did actually have evidence that would directly implicate the defendant—his own admission. To the contrary, here R.S. did not have any significant testimony to offer and her refusal to testify improperly suggested to the jury that she did.

The People argue the jurors also would have been left to speculate had R.S. not taken the stand, given the evidence presented connected her to the Monte Carlo and Grizzle. However, any such speculation would have been of minimal significance. The references to R.S. throughout the case were minimal and there was no suggestion that she

had any connection to or information about the crime beyond her relationship with Grizzle. Accordingly, the most likely inference the jury would have made was that the prosecutor did not call R.S. to testify simply because she did not have much to say, and that would have been a more accurate and less problematic inference for the jury to draw. We therefore conclude that the trial court erred by requiring R.S. to take the stand, knowing she would refuse to testify.

In addition, Nieber separately contends the trial court's instruction to the jurors that they could consider R.S.'s refusal to testify erroneously misstated the law. However, the instruction itself is legally accurate and is otherwise appropriate in cases in which a witness refuses to testify without a legal right to do so. (See *Morgain*, *supra*, 177 Cal.App.4th at p. 462; *People v. Lopez*, *supra*, 71 Cal.App.4th at p. 1554.) Nieber asserts *Morgain* does not support the instruction in this case because, unlike *Morgain*, the court here did not strike the testimony or instruct the jury to disregard it. However, the witness in *Morgain* answered a number of questions before refusing to testify, whereas here the prosecutor only asked a handful of general questions and R.S. gave no responses other than "I refuse to testify," such that there was no need for the trial court to strike the testimony here. Moreover, the court here did give a general instruction that the attorney's questions were not evidence.

That said, on a more basic level, we are at a loss, on this record, to understand what adverse inference, as against who, would be justified by the failure of R.S. to testify. Could the jury draw some inferences as against the defendants based on no evidence and no idea what the witness knew, did or would have said about the events in this case? The

procedure used here placed appellants at risk the jurors would infer some guilty behavior based on the fact an insignificant witness failed to testify. In our view, there is no rational basis in this record for any inference, adverse to the defendants which could have reasonably been drawn by the jury.

Thus, we conclude the trial court erred by requiring R.S. to take the stand in the first instance. Additionally, we are concerned of the risk that the jury would infer that R.S. was withholding some significant testimony when, in fact, she was not. As the trial court's instruction, albeit legally accurate, may have increased the risk of the jury drawing such an improper inference, appellants' arguments regarding the instruction relate more directly to the prejudicial nature of the court's error in allowing R.S. to take the stand, and we turn there next.

3. *Prejudicial Nature of the Error*

Although the trial court should not have required R.S. to take the stand, we conclude the error was harmless beyond a reasonable doubt and does not require reversal. (See *Chapman*, *supra*, 386 U.S. at p. 24; *Morgain*, *supra*, 177 Cal.App.4th 454, 468 [applying *Chapman* standard and finding any error harmless beyond a reasonable doubt].)

The trial in this case lasted approximately eight days and included testimony from over thirty witnesses. In comparison, R.S.'s testimony lasted approximately two minutes. In that time, the prosecutor asked her to identify the two defendants and asked her three times about her memory of the afternoon of May 11—she refused to answer each question—and the court held her in contempt. Although we agree with appellants that the testimony had the potential to mislead the jurors in the context of Evidence Code 352,

we do not believe the relatively short exchange had any significant impact on the jurors when considering the remaining evidence against appellants.

DNA from both appellants, as well as coconspirator Grizzle, was found on various items collected from the crime scene, and there was other evidence, such as the Monte Carlo, suggesting a connection between the three men. A cell phone recovered from Grizzle indicated he had been in the vicinity of the Tommy Drive residence at the time of the burglary and murder. Nieber was identified as the individual trying to use B.W.'s credit cards in video surveillance from the bank and Johnson's counsel conceded Johnson was the individual shown trying to use one of the cards in another video surveillance video from 7-Eleven shortly thereafter. Both Johnson and Nieber were subsequently arrested in high speed car chases, and Nieber had changed his appearance, suggesting consciousness of guilt. By contrast, the defense attacked the credibility of the witnesses and pointed out that the neighbor that called 911 had not seen the perpetrators leave but did not present any significant evidence of its own.

Further, the prosecutor relied extensively on the physical evidence and the testimony of S.P. and B.W. in her closing argument. She only mentioned R.S. once, stating, "Mr. Grizzle, the day before the murder, is registering at a Days Inn suite with that Monte Carlo, with a certain license plate, with documents belonging to [R.S.], who came in, and you heard she wouldn't testify, but [R.S.]—there's her documents in that car. And that is the same Monte Carlo Defendant Johnson was ultimately captured by law enforcement in." The prosecutor did not argue the jury should infer that R.S. had any significant evidence to offer or that R.S. was scared of the defendants, or even that they

should follow the court's instruction and consider the refusal in their deliberations. Moreover, as discussed, the DNA evidence also connected Grizzle and Johnson by placing them both at the Tommy Drive residence. Thus, R.S. remained an insignificant witness throughout the trial, the prosecutor did not improperly vouch for R.S. as Johnson contends, and, for largely the same reasons, her testimony was of minimal probative value in the first place. As such, her refusal to testify in front of the jurors was also insignificant in light of the substantial physical evidence.

Finally, while the court's instruction that the jury could consider R.S.'s refusal to testify undoubtedly placed some additional emphasis on that refusal for the jurors, the prosecutor did not refer to or argue the jury should make any such inference in her closing arguments.

We therefore conclude any error resulting from the testimony or the instruction was harmless beyond a reasonable doubt. (See *Chapman*, *supra*, 386 U.S. at p. 24.)

IV.

Coconspirator Statements and Related Jury Instructions

Johnson contends the trial court erred by failing to instruct the jurors with CALCRIM No. 418, which sets out the requirements for the use of a coconspirator's statement admitted under Evidence Code section 1223, and that the error was further compounded when the trial court changed CALMCRIM No. 358[8] from "Evidence of a Defendant's Statements" to "Evidence of a Perpetrator's Statements".

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8 CALCRIM No. 358 (Evidence of Defendant's Statements) states:

A. *Additional Background*

S.P. testified that he thought he heard the name "Larry" and B.W. testified that he heard one of the intruders say, "Larry said the PIN didn't work". Defense counsel did not object at any point when either witnesses discussed hearing the name "Larry". Defense counsel also did not request that the court instruct the jurors in accordance with CALCRIM No. 418.

However, during discussions regarding the jury instruction, the trial court noted that CALCRIM No. 358 was requested and that there were no statements specifically attributed to the defendants, Nieber and Johnson, but that there were several statements attributed to individuals that were involved in the burglary at the Tommy Drive residence on May 11 that could not be identified. The court therefore proposed modifying the instruction to say "you have heard that the defendant *may have* made an oral statement." Defense counsel objected to giving the instruction at all since none of the statements were actually attributed to the defendants but stated that if the court was inclined to give it, the instruction should be changed to state, "you have heard that a perpetrator of these crimes may have made an oral statement before the trial. You must decide whether either of the defendants made any such statement in whole or in part." The People responded that

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You have heard evidence that the defendant made [an] oral or written statement[s] (before the trial/while the court was not in session). You must decide whether the defendant made any (such/of these) statement[s], in whole or in part. If you decide that the defendant made such [a] statement[s], consider the statement[s], along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement[s].

[Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded.]

they would agree if the court removed the "may" and used "perpetrator" in place of "defendant" throughout.

After further consideration, the court instructed the jury using an amended version of CALCRIM No. 358 as follows: "You have heard evidence that a perpetrator made oral statements before the trial. You must decide whether a perpetrator made any such statement, in whole or in part. If you decide that a perpetrator made such a statement, consider the statement, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statement." The court later indicated that the word "perpetrator" referred to someone that directly committed a crime.

B. *Relevant Legal Background and Standard of Review*

We review claims of instructional error under de novo and independently determine if the instructions given correctly state the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218 (*Posey*).)

Evidence Code section 1223 states, "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy; (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivisions (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence."

When a coconspirator's statement that would otherwise be hearsay is admitted into evidence pursuant to the exception set forth in Evidence Code section 1223, the trial court has a sua sponte duty to instruct the jury pursuant to CALCRIM No. 418. (*People v. Smith* (1986) 187 Cal.App.3d 666, 680 (*Smith*); see also Bench Notes to CALCRIM No. 418 [reciting that the instructional duty is sua sponte].) CALCRIM No. 418, in turn, instructs the jurors that they cannot consider any out of court statements made by a coconspirator unless the People have proven, by a preponderance of the evidence, that there was a conspiracy, the declarant was a member of the conspiracy, the declarant made the statement to further the goal of the conspiracy, and the statement was made before or during the time the defendant was participating in the conspiracy.

CALCRIM No. 358 is typically given when there is evidence of an out of court statement made by the defendant and is intended to aid the jury in determining whether the defendant actually made the statement. (*People v. Diaz* (2015) 60 Cal.4th 1176, 1184 (*Diaz*).) The instruction is also applicable when the defendant's statement qualifies as a verbal act or element of the crime under a conspiracy theory and regardless of whether the statement is admitted for its truth. (*Ibid*.)

C. *Analysis*

Johnson asserts the trial court had a sua sponte duty to instruct the jury using CALCRIM No. 418 because evidence of coconspirator statements was admitted. However, the court only has such a duty when evidence is admitted pursuant to Evidence Code 1223 and, here, Johnson does not identify any statement admitted pursuant to Evidence Code section 1223. (*Smith, supra*, 187 Cal.App.3d at p. 680; Bench Notes to

CALCRIM No. 418.) Further, a review of the record also does not reveal any instance in which the court admitted any testimony that would have otherwise been excluded as hearsay pursuant to the exception set forth in Evidence Code section 1223.

In discussing the prejudicial nature of the alleged error, Johnson points to the statements by S.P. and B.W. indicating they heard someone at the scene use the name "Larry," but again, the record does not indicate that these statements were admitted pursuant to Evidence Code section 1223. Defense counsel did not object to the statements on hearsay grounds, when made, and neither the prosecutor nor the court ever indicated they were admissible under the exception set forth in Evidence Code section 1223. Indeed, it was reasonable for the court to conclude that the statements were not offered for the truth, but to identify the individual being spoken to, or about, as "Larry". (See *People v. Freeman* (1971) 20 Cal.App.3d 488, 492 [identification of name spoken during crime is not hearsay].)

In addition, to the extent the statement "Larry said the PIN didn't work" could be characterized as hearsay as offered either for the truth that the PIN did not work or that "Larry" was the one that said it, the statement was independently admissible under either the excited utterance or present sense impressions exception to the hearsay rule, as it was made during the robbery by an individual relaying information about what was occurring in the moment with the stolen credit cards. (See Evid. Code §1240; *People v. Hines* (1997) 15 Cal.4th 997, 1035-1036 [California recognizes hearsay exception for present sense impressions, or "statement[s] describing or explaining an event or condition made while the declarant was perceiving the event or condition"].) Because the statements

were not admitted pursuant to Evidence Code 1223, the trial court had no obligation to instruct the jury using CALCRIM No. 418, and the trial court did not err by failing to do so.

In any event, any error in failing to instruct the jury with CALCRIM NO. 418 was harmless. The failure to instruct regarding coconspirator statements is governed by the state harmless error standard and is deemed harmless unless it is reasonably probable that a result more favorable to the defendant would have been achieved in the absence of the error. (*People v. Prieto* (2003) 30 Cal.4th 226, 251–252; *People v. Sully* (1991) 53 Cal.3d 1195, 1231–1232.) Here, Johnson's DNA was found at the scene and his counsel conceded that he was the individual shown on the surveillance video from 7-Eleven using B.W.'s credit card. Compared to this evidence, the statements of S.P. and B.W. that they heard someone use the name "Larry", a fairly common name, was relatively insignificant. In addition, there was ample evidence from which the jury could have found that Nieber, Johnson, and several other men were working in concert, and that statements made to one another during the course of the robbery were made in furtherance of that conspiracy. In fact, the jury specifically made such a finding when it concluded both defendants committed robbery while acting in concert with two or more other persons. Thus, there is no reason to believe the jury would not have made the requisite findings if the court had instructed them using CALCRIM No. 418.

Finally, as we have concluded the trial court did not commit error by failing to give CALCRIM No. 418, the court's change of "defendant" to "perpetrator" in CALCRIM No. 358 could not have compounded the error as Johnson suggests.

Regardless, the change was requested and agreed upon by counsel and, given the court's definition of perpetrator, the instruction as given informed the jury that they should only consider the statements if they believed someone actively involved in the commission of the crimes actually made them. (See *Diaz, supra*, 60 Cal.4th at p. 1184.) As discussed, there was ample evidence of a conspiracy to commit burglary and/or robbery here and there was no indication that any of the statements at issue were made by someone other than a coconspirator. Thus, the only potential effect of this additional instruction would have been to make the jury more cautious of accepting the testimony regarding those statements by alerting them to the fact that they should only consider the statements if they were sure a coconspirator actually made them. Accordingly, we do not find any error in the court's decision to change "defendant" to "perpetrator" and, even if we did, such error would be harmless for the same reasons any error in failing to instruct the jury with CALCRIM No. 418 was harmless.

V.

Felony-Murder Instruction

Appellants contend the trial court erred by instructing the jurors as to the applicable elements of felony murder. Specifically, appellants assert CALCRIM No. 540B improperly allowed the jury to convict the defendants of felony murder based on a conspiracy to commit the underlying robbery. In addition, they assert the trial court erred further when it failed to instruct the jury with CALCRIM No. 417, which explains that a member of a conspiracy is also liable for any additional act done by any member of the conspiracy, even if the act was not one which the parties conspired to commit, if that act

was done to further the conspiracy and was a "natural and probable consequence" of the common plan or design of the conspiracy.[9]

A. *Additional Background*

The trial court instructed the jury pursuant to CALCRIM No. 540B as follows:

> "A defendant may be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the perpetrator.
>
> "To prove that a defendant is guilty of first degree murder under this theory, the People must prove that:
>
> "1. The defendant committed or attempted to commit or aided and abetted or was a member of a conspiracy to commit Robbery and/or committed or aided and abetted or was a member of a conspiracy to commit Residential Burglary;
>
> "2. The defendant intended to commit or intended to aid and abet the perpetrator in committing or intended that one or more of the members of the conspiracy commit Robbery and/or Residential Burglary;
>
> "3. If the defendant did not personally commit or attempt to commit Robbery and did not personally commit Residential Burglary, then a perpetrator, whom the defendant was aiding and abetting or with whom the defendant conspired, committed or attempted to commit Robbery and/or committed Residential Burglary;
>
> "AND

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[9] While this appeal was pending, the legislature passed Sen. Bill No. 1437, which altered the felony-murder rule as set forth in section 189. We address the impact of that legislation *post* in section VIII, but review the instructions given to the jury under the applicable law at the time the instructions were given. Accordingly, any reference to section 189 in this section refers to the statute as unaffected by Sen. Bill No. 1437.

"4. While committing or attempting to commit Robbery and/or committing Residential Burglary, the defendant or perpetrator caused the death of another person.

"A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

"To decide whether a defendant and the perpetrator committed or attempted to commit Robbery or Residential Burglary, please refer to the separate instructions that I will give you on those crimes.

"To decide whether a defendant aided and abetted a crime, please refer to the separate instructions that I have given you on aiding and abetting. To decide whether a defendant was a member of a conspiracy to commit a crime, please refer to the separate instructions that I have given you on conspiracy. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

"A defendant must have intended to commit or aid and abet or been a member of a conspiracy to commit the felonies of Residential Burglary and/or Robbery before or at the time that the defendant or the perpetrator caused the death.

"It is not required that the person die immediately, as long as the act causing death occurred while the defendant was committing the felonies.

"It is not required that the person killed be the intended victim of the felonies.

"It is not required that the defendant be present when the act causing the death occurs.

"You may not find a defendant guilty of felony murder unless all of you agree that a defendant or a perpetrator caused the death of another. You do not all need to agree, however, whether one of the defendants or a perpetrator caused that death."

The court also instructed the jury regarding the elements necessary to prove a conspiracy using CALCRIM No. 416, modified to identify 24 case specific overt acts that

the jury could consider in determining whether the defendants were members of a conspiracy to commit residential burglary and/or robbery.

During closing arguments, the prosecutor argued conspiracy was one of three theories upon which the jury could find the defendants guilty of felony murder.

B. *Standard of Review*

We review issues of statutory interpretation and claims of instructional error independently under a de novo standard of review. (See *People v. Prunty* (2015) 62 Cal.4th 59, 71; *Posey*, *supra*, 32 Cal.4th at p. 218.)

C. *Analysis*

1. *Liability for Felony Murder Based on Conspiracy*

Appellants first contend the trial court's instructions on felony murder were inadequate because section 189 does not extend liability for felony murder to individuals that conspire to commit the underlying felony. We disagree.

Felony murder is a purely statutory crime, created " 'to deter felons from killing negligently or accidently by holding them strictly responsible for killings they commit.' " *People v Pulido* (1997) 15 Cal.4th 713, 725 (*Pulido*); (*People v. Dillon* (1983) 34 Cal.3d 441, 463.) It is defined by section 189, which states, in part:

> All murder . . . that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking . . . is murder of the first degree.

(§ 189.)

Pursuant to section 189, an individual that commits or attempts to commit robbery or burglary, amongst other enumerated crimes, is guilty of first degree murder if an

individual is killed during the commission of the robbery or burglary. Section 31, in turn, provides that "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed," and the California Supreme Court has interpreted section 31 to include not just aiders and abettors but also individuals that conspire with another to commit a felony as principals. (*In re Hardy* (2007) 41 Cal.4th 977, 1025 (*In re Hardy*); see also *People v. Mohamed* (2011) 201 Cal.App.4th 515, 523-525 (*Mohamed*).)

Accordingly, under California law, at the time of trial, an individual that is guilty as a principal in the underlying felony, either directly or as an aider and abettor or a conspirator, is also guilty of felony murder when a victim is killed by a cofelon in the commission of that felony. (*People v. Cavitt* (2004) 33 Cal.4th 187 (*Cavitt*) [nonkiller cofelons liable for felony murder where homicide is committed in the perpetration of a robbery or burglary regardless of whether homicide facilitated commission of the underlying felony]; *People v. Anderson* (1991) 233 Cal.App.3d 1646 (*Anderson*) [aiders and abettors of a robbery liable for felony murder as a result of killing carried out by another individual during the robbery]; *Pulido, supra,* 15 Cal.4th at p. 724 ["In stating the rule of felony-murder complicity we have not distinguished accomplices whose responsibility for the underlying felony was pursuant to prior agreement (conspirators) from those who intentionally assisted without such agreement (aiders and abettors)"].) Here, the trial court's instruction accurately informed the jury of the law in this regard.

Johnson contends the legislature could have included conspiracy in section 189 if it intended to include conspiracies to commit the designated felonies as a basis of liability but, as discussed, section 31 separately makes both conspirators and aiders and abettors liable as principals, so it was not necessary for the legislature to list either in section 189. Similarly, appellants assert section 31 does not include conspirators or liability based on a conspiracy theory because it does not specifically mention conspiracies, but the court in *Mohamed* expressly rejected this theory and we agree with the court's analysis therein. (See *Mohamed*, *supra*, 201 Cal.App.4th at pp. 523-524.) In addition, Nieber also asserts conspiracy is not a separate theory from aiding and abetting. Again, we disagree based on the well-defined law in this area. (*Pulido, supra*, 15 Cal.4th at pp. 724-725; *In re Hardy*, *supra*, 41 Cal.4th at p. 1025; *Anderson*, *supra*, 233 Cal.App.3d. at p. 1659; *People v. Valdez* (2012) 55 Cal.4th 82, 149-150.)

Finally, Nieber contends that *People v. Durham* (1969) 70 Cal.2d 171 (*Durham*) establishes that, while evidence of a conspiracy can be used to prove the defendant aided and abetted, conspiracy does not constitute a separate theory of liability for felony murder. To the contrary, though, the Court in *Durham* simply concluded that the prosecution *in that case* presented a case based on a theory of liability premised on aiding and abetting, bolstered by evidence of the defendant's involvement in the continuing criminal enterprise that may have involved principles of conspiracy. (*Id*. at p. 180-186.) Nothing in *Durham* suggests that, under different facts, liability could not be based on a theory of conspiracy and, as discussed, there is ample California law establishing

conspiracy as a separate basis for liability. (Cf. *Cavitt, supra,* 33 Cal.4th 187; *Pulido, supra,* 15 Cal.4th at p. 724.)

We therefore conclude the court did not err in its instruction allowing the jury to base liability for felony murder on a theory of conspiracy to commit the underlying robbery and/or burglary.[10]

2. *Lack of Instruction Regarding Natural and Probable Consequences*

Next, appellants contend the instructions were inadequate because they failed to instruct the jury that the defendants could only be liable for the murder if it was the natural and probably consequence of the conspiracy.

Pursuant to the natural and probable consequences doctrine, a conspirator or aider and abettor is liable for additional crimes not planned but actually committed by the direct perpetrator (in the case of aiding and abetting) or other members of the conspiracy so long as those crimes are a natural and probable consequence of the intended crime. (See *People v. Chiu* (2014) 59 Cal.4th 155, 163; *People v. Kauffman* (1907) 152 Cal. 331, 334.) However, the doctrine is not applicable in the context of felony murder, a strict liability crime. (*People v. Cavitt, supra,* 33 Cal.4th at p. 197 ["The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them *strictly responsible* for any killing committed by a cofelon, whether

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10 Nieber also contends the court's instruction pursuant to CALCRIM No. 416, elements of an uncharged conspiracy, exacerbated this error but, since we have concluded there was no error, we need not and do not address this additional argument.

intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony."].)

The court in *Anderson* addressed a similar contention in the context of an aiding and abetting theory of felony murder. There, the court concluded the trial court properly instructed the jury on the consequences of the felony-murder rule as applied to a theory of aiding and abetting when it stated, " 'If a human being is killed by any one of several persons engaged in the perpetration of, or attempt to perpetrate, the crime of robbery, *all persons who* either directly and actively commit the act constituting such crime or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, *aid, promote, encourage, or instigate by act or advice its commission, are guilty of murder of the first degree, whether the killing is intentional, unintentional, or accidental*.' " (*Anderson, supra*, 233 Cal.App.3d at pp. 1656-1657.)

The defendants argued the trial court should have further instructed the jury that they could be liable for felony murder only if the killings were " 'the natural and reasonable or probable consequence of the acts [they] knowingly and intentionally aided and abetted.' " (*Anderson, supra*, 233 Cal.App.3d at p. 1658.) The court rejected the assertion, reasoning that the felony murder rule was applicable even if the killings were accidental or otherwise wholly unforeseeable, in part because it was well-established that section 189 was a codification of the felony-murder rule and that no independent proof of malice is required under the rule or the statute. (*Id*. at pp. 1658-1659.)

The court in *Anderson* did not directly address the applicability of this holding in the context of a theory based on a conspiracy to commit the underlying felony, but it did note all individuals that aid and abet a robbery are liable for felony murder when one of the robbers kills someone, even if the killing is accidental, and " '[t]he conspirator and the abettor stand in the same position in this regard—the killing is his act and his murder regardless of accident.' " (*Anderson*, *supra*, 233 Cal.App.3d. at p. 1659, quoting *People v. Ellenberg* (1958) 165 Cal.App.2d 495, 500.) Similarly, in *Pulido*, the California Supreme Court stated that conspirators and aiders and abettors stand in the same position with respect to the felony-murder rule in at least two other contexts.[11] (*Pulido*, *supra*, 15 Cal.4th at pp. 724-725 [addressing complicity in a cofelon's homicidal act and those that join the conspiracy or aid and abet the underlying felony only after the killing is complete].)

These authorities support the conclusion that the natural and probable consequences doctrine does not apply in cases of felony murder, regardless of whether the felony murder is based on a theory of aiding and abetting or conspiracy. (*Anderson*, *supra*, 233 Cal.App.3d. at pp. 1658-1659; *Pulido*, *supra*, 15 Cal.4th at p. 725.) Moreover, we agree with the People that, given the objectives of the felony-murder rule as codified in section 189, there is no rational basis for treating conspirators different

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11 Nieber contends that these statements in *Pulido* were dicta, but the court in *Pulido* cited prior authority and stated the court had not previously distinguished between conspirators and aiders and abettors with respect to the rule of felony-murder complicity. (*Pulido, supra*, 15 Cal.4th at p. 724.) Accordingly, we find the court's statements instructive.

from aiders and abettors in this regard. (See *Cavitt, supra,* 33 Cal.4th at p. 197.) Accordingly, we conclude the trial court did not err in failing to give the additional natural and probable consequences instruction.

3. *Any Error Was Harmless*

Even if we were to conclude the trial court erred by including conspiracy or by not including the natural and probable consequences doctrine in its instructions on felony murder, we would conclude that any error was harmless.

First, as in many of the relevant cases discussed herein, the evidence established that Nieber and Johnson were directly involved in the underlying felonies, and therefore formed a basis for liability under either a conspiracy or an aiding and abetting theory. (See, e.g., *Cavitt, supra,* 33 Cal.4th 187; *Durham*, *supra,* 70 Cal.2d 171; *Pulido*, *supra,* 15 Cal.4th at p. 724.) The only theory presented to the jury was that both defendants were present at the Tommy Drive residence on the day of the robbery and murder, as evidenced by the fact that each made attempts to use at least one of the cards stolen from B.W. during the commission of the crime.

Further, *Anderson* clearly establishes the defendants would not have been entitled to an instruction on the natural and probably consequences doctrine if the conviction were based entirely on an aiding and abetting theory. (See *Anderson*, *supra*, 233 Cal.App.3d. at p. 1658; *People v. Smith* (2014) 60 Cal.4th 603, 616 [explaining the difference between conspiracy and aiding and abetting].) Even under a conspiracy theory, though, there was ample evidence the murder was a natural and probable consequence of the home invasion. The evidence establishes that at least one of the

assailants had a gun and used it to threaten S.P. and B.W. during the commission of the underlying felonies.

VI.

Ineffective Assistance of Counsel

Nieber contends any failure by his attorney to object to the improper jury instructions resulting in a forfeiture of those arguments on appeal amounted to ineffective assistance of counsel. Because we have not found forfeiture with respect to any of those arguments, we need not address Nieber's ineffective assistance of counsel claims.

VII.

Cumulative Error

Nieber also contends the cumulative effect of errors denied him a fair trial. A series of trial errors, though harmless when considered independently, may in some circumstances rise to the level of prejudicial, reversible error if they deprive the defendant of his or her right to due process and a fair trial. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

As we have discussed, the trial court erred in two respects here, by improperly limiting the cross-examination of B.W. and allowing R.S. to take the stand despite knowing she would refuse to testify, but each of the errors were harmless individually. For all the reasons discussed with respect to the individual errors, we conclude the accumulation of the claimed errors was also harmless and did not deprive Nieber of due process or a fair trial. We therefore reject Nieber's claim of cumulative error.

VIII.

Resentencing Based on Felony Murder

Sen. Bill No. 1437 was signed into law during the pendency of this appeal, and amendments set forth therein became effective on January 1, 2019. Appellants assert, primarily in supplemental briefing submitted after the amendments became effective, that the amendments substantially changed the elements of felony murder, that the trial court therefore did not properly instruct the jury on the elements of felony murder, and the People did not present sufficient evidence to support a conviction for felony murder under the new law. They contend that their convictions must be reversed as a result.

As relevant here, Sen. Bill No. 1437 amends sections 188 and 189 to "prohibit a participant in the perpetration or attempted perpetration of one of the specified first degree murder felonies in which a death occurs from being liable for murder, unless the person was the actual killer or the person was not the actual killer but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer, or the person was a major participant in the underlying felony and acted with reckless indifference to human life . . . ." (Legis. Counsel's Dig., Sen. Bill No. 1437 (2017-2018 Reg. Sess.).) In addition, it also adds section 1170.95, which creates a procedure for vacating the conviction and resentencing of a defendant who was prosecuted under a theory of first degree felony murder or murder under the natural and probable consequences doctrine, who was sentenced for first degree murder, and who could no longer be convicted of murder because of the changes made to sections 188 and 189. (Sen. Bill No. 1437 (2017-2018 Reg. Sess.) § 4.)

The parties agree that Sen. Bill No. 1437 is retroactive, but the People contend the petitioning process set forth in the new section 1170.95 is analogous to Propositions 36 and 47, both of which required defendants to follow specific petitioning procedures in the superior court to obtain relief, and, accordingly, the exclusive remedy for appellants to pursue their claims that Sen. Bill No. 1437 renders their convictions invalid is through the petitioning process laid out in the statute. (See *People v. Conley* (2016) 63 Cal.4th 646, 657 (*Conley*) [Proposition 36]; *People v. DeHoyos* (2018) 4 Cal.5th 594, 603-604 (*DeHoyos*) [Proposition 47].) The court addressed similar contentions in coconspirator Grizzle's appeal and, for the same reasons expressed in the opinion in that case, we agree with the People. (See *People v. Grizzle* (Feb. 27, 2019, D072975) [nonpub. opn.] (*Grizzle*).)

As in Grizzle's appeal, we continue to find the California Supreme Court's recent decisions in *Conley* and *DeHoyos* instructive with respect to Sen. Bill No. 1437. Like the statutory amendments addressed in *DeHoyos*, section 1170.95 is "an ameliorative criminal law measure that is 'not silent on the question of retroactivity.' " (See *DeHoyos*, *supra*, 4 Cal.5th at p. 603 [addressing application of the Reform Act and Proposition 47].) It sets forth a procedure whereby "[a] person convicted of felony murder . . . may file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all the following conditions apply . . . ." (§ 1170.95, subd. (a); compare §§ 1170.126, subd. (b), 1170.18, subd. (a).) Further, also like the Reform Act and Proposition 47, section 1170.95 does not distinguish between a defendant whose sentence is final and one who is still

challenging his sentence on direct appeal and allows the superior court to vacate a defendant's conviction and resentence him. (See *DeHoyos*, at p. 603; § 1170.18, subd. (b); § 1170.95, subd. (d)(3).) Accordingly, we conclude this court cannot vacate the felony murder convictions or resentence Nieber or Johnson under section 1170.95 and appellants must instead follow the procedure set forth in section 1170.95 in the first instance. (See *Conley*, *supra*, 63 Cal.4th at p. 658; *DeHoyos*, at p. 603; *People v. Martinez* (2019) 31 Cal.App.5th 719 (*Martinez*), review and depub. request denied May 1, 2019, No. S254288 [reaching the same conclusion with respect to Sen. Bill No. 1437].)[12]

Nieber contends the trial court would deny his petition for lack of jurisdiction while his appeal is pending, and that he should not have to choose between his right to appeal and his right to file a petition pursuant to section 1170, but this concern has not been born out with respect to the other similar statutory amendments discussed here. To the extent there is any doubt, nothing in this opinion restricts any rights appellants may have under Sen. Bill No. 1437 to petition the superior court for relief.

In addition, Nieber asserts the People have taken an inconsistent position on section 1170.95 insofar as they have challenged the constitutionality of the petition process that they now argue is the sole avenue for appellants to address the implications of the change in law to their cases. We disagree. The People may raise any arguments

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12 Appellants contend *Martinez* was wrongly decided but we do not find their arguments in that regard persuasive and note that the California Supreme Court recently denied a petition for review and request for depublication.

they wish with respect to the amendments set forth in Sen. Bill No. 1437 but, just as appellants, they must first do so in the context of the petitioning procedure set forth in section 1170.95. Should the trial court determine the statutory amendments are unconstitutional, as the People assert, the relevant defendants will have an opportunity to appeal that decision to this court. However, in the absence of a ruling finding Sen. Bill No. 1437 unconstitutional, it remains the law and both the People and the appellants must follow the procedures set forth therein.[13]

Finally, appellants contend they could not have been convicted for felony murder under the law as amended by Sen. Bill No. 1437 and that reversal here is required because this is a substantive issue unlike the resentencing at issue in *Conley* and *DeHoyos*. We disagree. Proposition 47 also represents a substantive change in the law, insofar as it reclassified certain offenses from felonies to misdemeanors. Regardless, the substantive nature of the amendments is not significant to the retroactivity analysis where, as here and in *Conley* and *DeHoyos*, the Legislature has explicitly provided a procedure for those individuals previously convicted under the prior law. (See also,

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13 In support of his briefing on this issue, Nieber also filed a Request that this court take Judicial Notice of briefs submitted by the People regarding petitions pursuant to section 1170.95 submitted by defendants in two unrelated cases. Although we have authority to take judicial notice of the records of any court in the state pursuant to Evidence Code sections 452 and 459, we deny Nieber's request as the documents were not part of the record when judgment was entered in the present case and are not otherwise relevant to the present appeal. (See *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256, 264; *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.)

Martinez, *supra*, 31 Cal.App.5th at pp. 724-729 [addressing a similar contention and finding *Conley* and *DeHoyos* to be instructive].)

IX.

Resentencing Based on Dueñas

At sentencing, the trial court imposed a $200 court operations assessment fee (Pen. Code, § 1465.8), a $150 criminal conviction assessment (Gov. Code, § 70373), a $300 restitution fine (Pen. Code, § 1202.4, subd. (b)), a $39 theft fine (Pen. Code, § 1202.5), and a $154 criminal justice administration fee (Gov. Code, § 29550) against both Nieber and Johnson, without making any determination as to either Nieber or Johnson's ability to pay.

In a second round of supplemental briefing filed with the permission of this court in reliance on the recent decision in *Dueñas*, *supra*, 30 Cal.App.5th 1157, Nieber and Johnson assert the trial court violated their state and federal due process rights by imposing certain fines and assessments pursuant to Government Code section 70373 and sections 1465.8 and 1202.4, subdivision (b), without first making findings as to their ability to pay them.

However, neither defendant objected to the imposition of the fines, fees, and assessments or otherwise asserted an inability to pay them in the trial court. Accordingly, appellants forfeited any such arguments on appeal. (See *People v. Avila* (2009) 46 Cal.4th 680, 729 [defendant forfeited inability to pay argument by failing to object to imposition of restitution fine under Pen. Code, former § 1202.4]; *People v. Fransden* (2019) 33 Cal.App.4th 1126, 1153-1155 [forfeiture is not excused by holdings in

Dueñas].) In any event, both defendants were sentenced to lengthy prison sentences and it was reasonable for the trial court to presume the assessments and restitution fines at issue, amounting to a total of $840 each, would be paid out of defendants' future prison wages. (See, e.g., *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487.) We therefore decline to remand either case for resentencing with respect to the fines and assessments imposed by the trial court.

DISPOSITION

The judgments are affirmed. This opinion does not restrict any rights Nieber or Johnson may have under Sen. Bill No. 1437 to petition the superior court for relief.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.